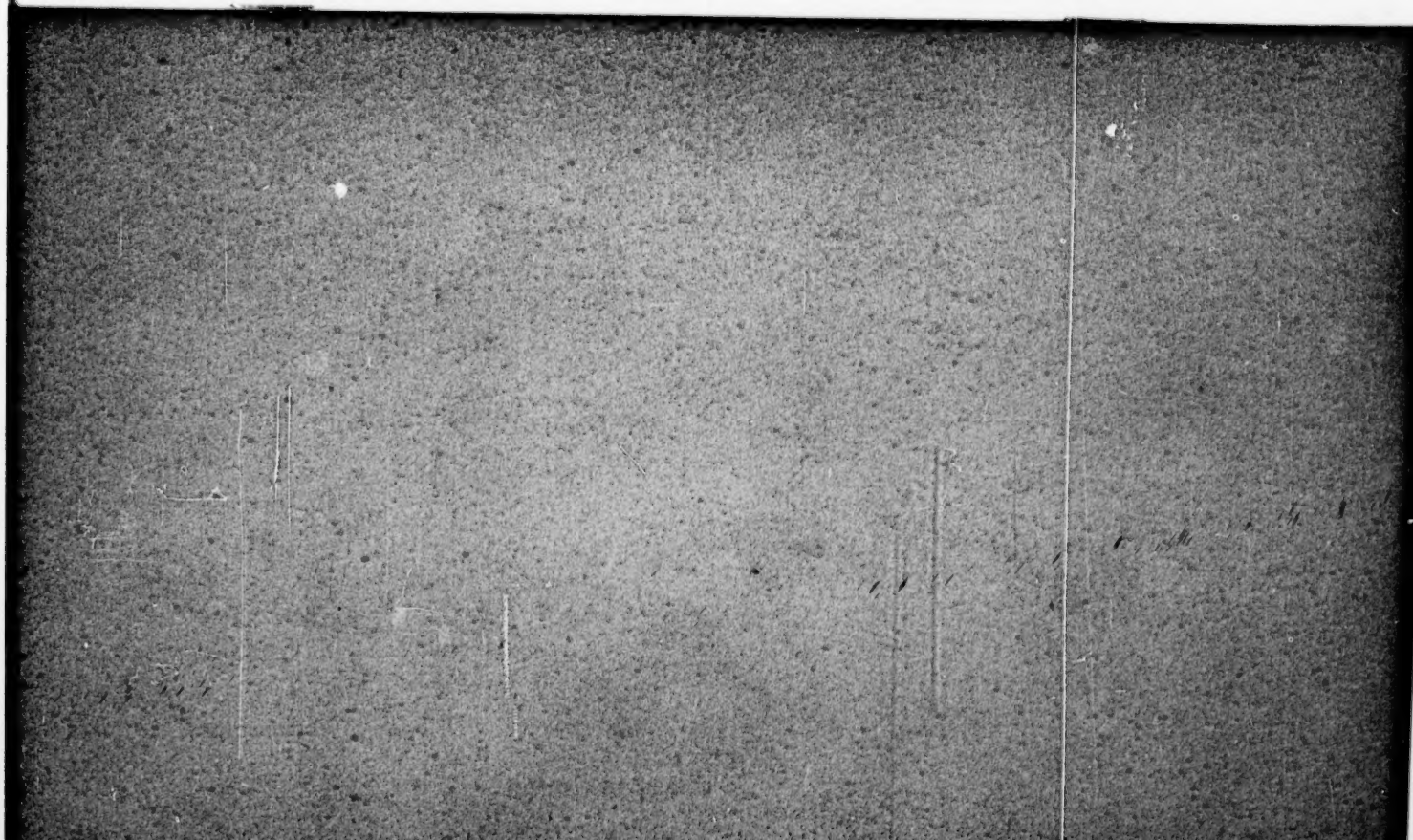

SUPREME COURT, U. S.
FILED
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74- 74-818

UNITED STATES OF AMERICA ex rel. ANTHONY REGINA,
Petitioner,

against

EDWIN LAVALLEE, Superintendent, State Correctional Facility at Dannemora, New York,
Respondent.

UNITED STATES OF AMERICA ex rel. JOHN J. BATTISTA,
Petitioner,

against

HAROLD N. BUTLER, Superintendent, State Correctional Facility at Wallkill, New York,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinion Below

The opinion of the District Court is unreported. A copy of the opinion appears as petitioners' Appendix A3. The opinion of the United States Court of Appeals for the Second Circuit is reported at 504 F. 2d 580 and appears as petitioners' Appendix A2.

Jurisdiction

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Question Presented

Does petitioners' allegation of an undisclosed prosecution promise raise a substantial constitutional question under *Giglio* v. *United States*, 405 U.S. 150 (1972) where a) petitioners, at trial, were free to explore the allegedly undisclosed promise of leniency to a prosecution witness, b) petitioners failed to establish the existence of such a promise at a state *coram nobis* hearing held subsequent to their conviction, and c) such promise, even if proved, was insubstantial and would not have affected the jury verdict?

Facts

Petitioner John J. Battista is currently incarcerated in the Wallkill Correctional Facility, Wallkill, New York. Petitioner Anthony Regina is currently incarcerated at Clinton Correctional Facility, Dannemora, New York. Both were convicted on April 17, 1964, after trial by jury, of the crimes of murder in the first degree and assault in the first degree. A sentence of life imprisonment as to the crime of murder in the first degree was imposed on petitioners following a penalty hearing pursuant to former New York Penal Law, § 1045-a. In addition, petitioners Regina and Battista were sentenced to indeterminate terms of from five to ten years and from five to fifteen years respectively upon their convictions for assault in the first degree, both sentences to run concurrently with the sentences imposed for murder in the first degree.

Petitioners appealed the judgments of conviction to the Appellate Division, Second Department which affirmed

25 A D 2d 658. The New York Court of Appeals also affirmed 19 N Y 2d 65.

Petitioners subsequently instituted a *coram nobis* application in the Suffolk County Court, claiming that the principal witness for the prosecution, Anthony Getch, had lied when he testified that no promise had been made to him by the District Attorney's office as an inducement for his cooperation. A hearing was held on this application at which petitioners were represented by Maurice Edelbaum, Esq. The application was denied by order entered May 13, 1971 (LIPETZ, J.). This order was affirmed by the Appellate Division, Second Department on March 13, 1972. Leave to appeal to the New York Court of Appeals was denied on June 12, 1972.

Thereafter, petitioners instituted habeas corpus applications in the United States District Court for the Eastern District of New York raising the same claim presented on appeal in the New York Courts. Judge Mishler denied these applications on August 9, 1973. The United States Court of Appeals for the Second Circuit affirmed on October 2, 1974.

The Trial

At approximately 1:30 P.M. on August 9, 1973 (461),* Louis Mariani, a member of the Gallo gang (1274), left the home of his sister-in-law, Louise Mangiamelli (249, 936), located near Port Jefferson in the Heatherwood Development (249, 937), driving a 1961 Chevrolet hardtop convertible (252). Mariani was accompanied by his sister-in-law, Louise, and a family friend, Francis Anthony Getch (225, 937), whom he had known from the old neighborhood (248, 343, 936), and with whom he had become very friendly

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* Numbers in parentheses refer to pages of petitioners' trial.

in the past year (343). Getch was a convicted felon, having been convicted of assault and robbery in July 1959 (241, 336-337, 1050). Prior to that he had been convicted of petit larceny and sentenced to three years (240). He had been on parole for the petit larceny when he committed the assault and robbery (335, 472).

Louise wanted to go to the shopping center located on Nesconset Highway (255, 256) and as Mariani came out of the Heatherwood Development, he turned east on Nesconset Highway and proceeded towards Port Jefferson (266, 347, 937). His sister-in-law was seated in the rear of the car and Getch was seated in the front seat, to the right of Mariani (347, 939). The car was in the left hand lane, the radio was off and its speed was about 40 to 45 miles per hour (266, 347, 348, 362, 946, 947, 949).

Five minutes after leaving the house (938) and two minutes after they entered Nesconset Highway (350) at about 1:30 to 2:00 p.m. (354), a big black car pulled up alongside on the right (257, 258), with its radio playing (257). At this point, Getch turned and saw three people in the car, which was a black Chrysler. He identified one as Regina, calling him "Fat Tony" and one as Battista, calling him "Moose" (257, 258, 363, 369, 373, 384). Regina was driving the car and Battista was sitting to the rear of the driver (258). He could not identify the third man in the car (258, 385). Getch observed the individuals in this other car for four or five seconds (261, 363, 474), at the end of which time shots began to be fired from the other vehicle at the Mariani car (259, 363, 390, 940). Prior to any shots being fired, however, Getch observed Regina raise a pistol, which was in his right hand, in the direction of Getch (258, 259, 387), but he did not think he was going to shoot (389). All of the shots were fired in about five seconds, and two shots had been fired before Getch ducked under the dashboard (392). Getch estimated that approximately fourteen or fifteen shots were fired and that there could have been

more than one gun used (390). Expert examination of the vehicle disclosed that there were nine bullet holes in the automobile (573) and further examination of two expended bullets and a fragment recovered by the expert revealed that all three of the bullets examined were fired from separate weapons (472).

Getch testified that he knew the defendant Regina and said that he had first seen him about five or six months before he was shot (461) on President Street, Brooklyn, in an automobile (452). He then saw him on three subsequent occasions within a period of a few weeks (452, 455), although he cannot remember if it was March or "the next month" (456). He further testified that he had known Battista over a period of two years (457) and during that period had seen him about ten to fifteen times (464). He said that he had seen Battista on 5th Avenue, Bond Street, and Frankie Illiano's office at Warren Street (459, 481-482). He also stated that he saw Battista at the ILA Club on a number of occasions and that he used to belong to the Club; he was a member for about five years (490, 491, 494).

Louise Mangiamelli testified that she did not see any automobile but heard gun shots after something had hit the windshield (940), that she did not look outside the automobile, but threw herself to the floor (945). After the shots had been fired, Getch had received four flesh wounds (260, 599) and Louis Mariani had received fatal bullet wounds in the head (261, 262, 602), a bullet having entered his ear in the right temple, penetrated his brain and exited from the left temple (604-605, 610).

Immediately after the shooting, Getch got up and saw a black Cadillac going very fast, but the Chrysler was nowhere in sight (260, 291). Louise Mangiamelli testified that about forty seconds after the first shot was fired, she jumped over the front seat (262, 947). At this point, the car was stopped (392, 950). Prior to her jumping over the front seat, she placed something on Mariani's head (262,

393) and started the automobile. After she had started the automobile, she looked up and saw a green car (950).

She then proceeded along Nesconset Highway, seated between the two men, towards Port Jefferson, and tried to make a turn at Jayne Boulevard but struck a marker post and the car stalled (275, 592, 963, 964). Getch testified that at this point, he got out of the car, took off his shirt, went around the car, and put the shirt on Mariani's head, that he then re-entered the car after it started again and Louise drove them to a hospital (276, 964).

Mariani was examined by a neurosurgeon at Mather Memorial Hospital at about 3:00 p.m. and was found to be close to death and beyond medical assistance, as the result of penetrating wounds of the head (601-604). He was pronounced dead at 4:40 p.m. on August 9, 1963 (605) and the cause of death was a bullet wound of the skull and brain (605, 611).

Upon arrival at Mather Memorial Hospital, Getch was questioned by a Detective Brown (306) and later that night a man identifying himself as Mr. Smith, the District Attorney, accompanied by a Judge, saw him, at which time Getch was held in $20,000 bail as a material witness and removed to the County Jail on August 10th (306, 309). He also testified that the Judge presiding at the trial was not the Judge who had set bail (308). Approximately a week later, Detective Brown spoke to Getch again (310). He also signed a writ of habeas corpus in the early part of September (301) and identified the signature on the writ as being his (302), but testified he was never asked to swear to the contents of the document, reads very little English and did not read the writ (303). He remembers telling Brown that the shots were fired from a tan 1951 or 1952 Oldsmobile (400). He was then returned to the Tombs as a parole violator, where he remained for some thirty odd days (311, 314), at the end of which time he was returned to Elmira (315).

While at the Tombs he asked to speak to a parole officer (311, 417). The parole officer came to the Tombs and Getch asked him to communicate with the District Attorney of Suffolk County (419). About a week prior to his asking the Parole Officer to communicate with the District Attorney, he had been informed that he would have to go back to Elmira (419, 420). About a week after speaking with the Parole Officer, he spoke with Assistant District Attorney Bendersky and gave a statement (427). Getch further testified that he knew that he was going back to Elmira to do the time owed by him, never asked for any favor for his testimony (429, 430) and in fact his parole terminated on December 30, 1963. He went before the Parole Board on November 18 or 19, and was discharged from Elmira the following day (468). The testimony of his parole officer was to the effect that he was delinquent from August 8, 1963 (1058), that his parole was terminated on December 30, 1963 (1059), that he believed that a date of actual delinquency could not be pre-dated (1065, 1084) and that if the Parole Board has such authority to pre-date a delinquency, he had never seen it done (1085).

During the course of his cross-examination, an obvious attempt was made by the defense to test Getch's memory and credibility by asking him if he would look at the people in the Courtroom and see if he could identify the Judge who set bail at Mather Memorial Hospital, holding him as a material witness. At this time, Getch identified Judge Thomas M. Stark, County Judge of Suffolk County, who was present in the Courtroom, as the Judge who so fixed the bail (402). He later testified that he had not seen the Judge who set the bail before August 9, 1963, nor had he seen him since that date until the day he pointed him out on trial (516).

Louise Mangiamelli testified that she was also questioned by the police on August 9, 1963, gave a statement and was held as a material witness in $20,000 bail, which bail was

posted (942, 943). She also stated that she never told anyone who fired the shots that killed her brother-in-law (951) and denied stating to Getch immediately after the shooting in words or in substance "That bastard Fat Tony shooting at us with me in the car" (961) and she further denied stating immediately after the shooting that she told Getch in words or substance "you say it's a green automobile and I'll say it's a tan one" (963).

Getch in rebuttal testified that after the shooting he had a conversation with Louise Mangiamelli and that Louise Mangiamelli said "that fat bastard shooting with me in the car", and that he told her to say she had seen an Oldsmobile and that she had replied that she would say it was green and he would say it was tan (1044, 1046).

The defendant Battista offered the testimony of various witnesses who stated that at 1:00 p.m. or shortly thereafter, the defendant Battista was on the Marra Bros. pier, Court Street, Brooklyn, on August 9, 1963 (709, 725, 787, 843, 866, 868, 878).

Defendant Regina offered the testimony of his wife and one Carol DeSerio. Only the testimony of his wife, however, was to the effect that as of 1:30 p.m. on August 9, 1963, her husband was at home, remaining there all day, all night and all the next day (1000, 1002, 1003).

The jury deliberated for some forty-eight hours (1235) and returned a verdict of guilty as charged as to all counts of the indictment (1236).

The *Coram Nobis* Hearing

Jacob Bendersky testified for the petitioners. He stated that he was an assistant district attorney on the staff of the Suffolk District Attorney from 1943 to 1963 with the exception of five years, from the middle of 1951 to 1957

(6-7).* He recalled interviewing Getch but he did not remember whether it was at Getch's request or not (8). The interview took place at the Office of the Parole Board, Broadway, New York at a time when Orey Edwards of the Suffolk County Police Department, William J. Quinn of the New York State Division of Parole and John McCarthy of the New York State Parole were in attendance (12-13).

It was his impression that Getch was a parole violator (8). He recalled that Getch indicated his concern for his and his family's life if he testified. He spoke in terms of telling Getch that if he were released from prison at a date earlier than his normal expiration date, it would not be appropriate to release him until several months had gone by (9-11).

Mr. Bendersky further testified that he spoke with a member of the Parole Commission who was there about Mr. Getch's status (19); that he did not remember how much time Getch had to serve (20); that he did not remember the name of the person he talked to (21); that he had a discussion between Chief Edwards, himself and the person about helping Getch out (22); that he did not know how much time Getch owed (24); that he, Mr. Bendersky, had no authority to make this promise unless the Parole Board approved (25); that he did not make any written notation of it anywhere (26); that he reviewed the statement made by Getch at that time before it was signed by Getch and that it contained the following questions and answers:

> "Question: Has anyone made any promises to you with respect to letting you off from anything in return for this statement?

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* Numbers in parentheses refer to pages of petitioners' *coram nobis* hearing.

"Answer: You mean as far as jail is concerned?
Answer by Mr. Bendersky: . . . That's right.
Answered by Mr. Getch: . . . No." (33-34)

Mr. Bendersky further testified that he, Mr. Bendersky, never implemented any promise, never wrote any letters and never made any effort to secure the release of Mr. Getch (40); that he told no-one in the District Attorney's Office about the promise that he allegedly made (40); that he left the office of the District Attorney on January 1, 1964 prior to the trial. He did not recall a meeting with Mr. Catterson, the Assistant District Attorney who tried the case about Getch or telling Mr. Catterson that he did not make any promises to Getch (38-39).

James Catterson testified for the People at the hearing that he met with Mr. Bendersky in the latter part of January, early part of February, 1964 and asked Bendersky specifically whether any promises had been made to Getch and was informed:

". . . no, no, there were no promises made . . .". (49)

Orey Edwards testified that he was present at the meeting between Bendersky and Getch and that no promise was made to Getch about jail time; the only promise was that his family would be given protection (98, 99).

William Quinn testified that he was employed with the New York State Division of Parole, that he was present at the meeting between Getch, Bendersky and Edwards, that he was present when the statement was taken and that Mr. Bendersky did not discuss any promise concerning jail time or getting off of parole. He testified further that his supervisor was one John McCarthy and that McCarthy may have been present at the beginning of the conversation but left thereafter (71).

John McCarthy testified that he was a Senior Parole Officer in charge of the office at 320 Broadway; that he was

present at the meeting; that previously, Getch had indicated to him that he wanted to testify as a witness (107) and that he, McCarthy, transmitted this information to the District Attorney's office; that he did not recall any conversation with Mr. Bendersky about giving Getch an early release because of his testimony; that he, in fact, could not authorize either himself or anyone else to make such a promise (109); that Getch was being held as a material witness in the Suffolk County Jail. Mr. Quinn had testified that Getch was released to Suffolk County in their custody (72) on November 14, 1963 (82).

At the time of the trial, Getch had served his time and was not on parole or in custody.

After a thorough review of the evidence adduced at the hearing, Judge Lipetz found that the defendants failed to sustain their burden of proof by a wide margin that Getch had testified falsely.

Reasons Why Certiorari Should Be Denied

A. No promise of leniency was made to a prosecution witness.

It is petitioner' contention here, relying on *Giglio* v. *United States,* 405 U.S. 140 (1972), and *Napue* v. *Illinois,* 360 U.S. 264 (1959), that they are entitled to a new trial because an alleged promise by Jacob Bendersky, an assistant prosecutor who had participated in the investigation of the Mariani murder, of an early release from prison for Anthony Getch, a prosecution witness, was not disclosed to the defense at trial.

However, petitioners' claim of an undisclosed promise loses all force in the face of the record herein. It was petitioners' contention throughout the trial that Bendersky had made such a representation in conjunction with members of the New York State Parole Board. Contrary to the situation in *Giglio* and *Napue,* Bendersky's name as well as the

names of the parole officers who had spoken to Getch were freely mentioned throughout the trial. Yet notwithstanding this fact and the defense theory that some promise had been made, petitioners failed to call either Bendersky or any parole officer to the stand at the time of trial.

There was no claim at trial and there is none here that Bendersky or the parole officers were unavailable to the defense or were in the exclusive control of the prosecution. In short, petitioners, in this Court are attempting to make a deliberate strategic decision by trial counsel in the state court to rely on Bendersky's absence as well as that of the parole officers to cast doubt on the motives for Getch's testimony into a suppression argument. However, such an argument upon this record cannot withstand analysis. Cf. *United States ex rel. Fein* v. *Deegan,* 410 F. 2d 12 (2d Cir.), *cert. denied* 395 U.S. 935 (1969); *United States* v. *Marquez,* 363 F. Supp. 802 (S.D.N.Y. 1973).

Moreover, subsequent events confirmed trial counsel's decision not to call Bendersky as a witness and use his absence in an attempt to shake Getch's testimony.

Six years after their conviction, petitioners had a full hearing on their claim of a prosecution promise to secure an early release from custody for the witness Getch. Petitioners were represented by extremely competent counsel, Maurice Edelbaum, Esq. The adequacy of that hearing is unquestioned herein, and at its conclusion, Judge Lipetz found that no promises were ever made to Getch by Bendersky.

This factual finding was amply supported by the record of the *coram nobis* hearing. The testimony of Jacob Bendersky, the only witness for the petitioners, was extremely vague throughout. Although he testified that he believed he told Getch that "we agreed that it would not be appropriate to release him at the time, but that if several months went by an effort would be made to release him and that he would

be released" (p. 9), he stated that he only had the *impression* that Getch was a parole violator (p. 8) and he had no recollection of how long Getch would be held if he did not intercede with the Parole Board (p. 11). Contrariwise, Bendersky was definite in his recollection that Getch was concerned about his safety and he even recalled Getch's wife being present at the Parole Office on September 19, 1963. He recalled that she was depressed about the situation and if protection were provided, she said Getch could talk (p. 18). He further admitted that he had no authority to make any promise of an early release from prison unless it was cleared with the Parole Board (p. 21). He made no written notation for the file of any promise to Getch (p. 25). The question and answer he took from Getch specifically recited that no promise as far as jail is concerned had been made, and Bendersky did not undertake to clarify Getch's answer in any way (p. 33). He did not remember discussing the case with Assistant District Attorney Catterson (pp. 38, 103). He never told anybody about the promise after he left the District Attorney's Office (39).

Catterson testified that he spoke with Bendersky briefly after Bendersky left the Suffolk County District Attorney's office. Bendersky told him that no promise had been made to Getch other than that his family would be taken care of and be kept safe (pp. 47-49).

Quinn, a parole officer, present on September 18, 1963, in the company of Bendersky, Edwards and Getch, testified that he did not have any discussion with Bendersky as to Getch's actual release date or as to any promise of an earlier release date while he did recall a conversation concerning a promise of protection for Getch and his family if Getch were to testify at trial (pp. 67-70).

Chief Edwards testified that he was present at the office of the Parole Board with Bendersky, Getch and Quinn (p. 87). He remembered that a statement was taken from Getch but he did not recall any conversation in regard to

Getch's parole status. Rather, he remembered that Getch was concerned about his family and he wanted protection (pp. 97-98).

Finally, John McCarthy, a Senior Parole Officer, who arranged the meeting between Getch and Bendersky, had no recollection of any conversation in regard to getting Getch back on the street or off his parole status (pp. 108-109). In fact, he added neither he nor anyone in the New York office could make any promise regarding an early parole release date (pp. 109-110). He did not recall Getch inquiring as to how long he would have to serve on his parole violation but he did recall Getch being concerned for his personal safety (p. 114).

The records of the Parole Office subpoenaed by petitioners for Judge Lipetz (Petitioners' appendix in the District Court, p. 41) further support his finding. The records of the Parole Office indicate that Getch was concerned for his safety and stated further that Parole Officer Quinn informed Getch that the matter of his release was up to the Parole Board and that Getch would be advised of their decision in the future.

In short, Judge Lipetz was presented with the resolution of a factual issue. He heard testimony, was in a position to assess the demeanor of the various witnesses and was called upon to make judgments of credibility which were for him as the trier of fact. He did so and on the record his conclusions were well supported. *LaVallee* v. *Delle Rose*, 410 U. S. 690 (1973); *United States ex rel. Johnson* v. *Department of Correctional Services of the State of New York*, 461 F. 2d 956 (2d Cir. 1972); *United States ex rel. Fein* v. *Deegan, supra.*

Bypassing entirely defense counsel's deliberate decision not to call Bendersky at trial and attempting to circumvent the factual holding of Judge Lipetz that no promises were made to Getch, pettitioners' brief in this Court argues

that Judge Lipetz' holding is irrelevant since *Giglio* holds that a statement by an assistant prosecutor that he promised leniency to a prosecution witness which is not disclosed at trial is itself sufficient for a new trial notwithstanding evidence contradicting such an assertion. Petitioners thus conclude that a state trial court on a post-conviction application is barred from reaching a factual conclusion as to whether such a promise was ever, in fact, made.

However, even assuming *arguendo* the validity of such an argument, petitioners' position at bar is not enhanced. Bendersky never definitively stated that he had promised Getch any time off his sentence in return for his testimony. The only aspect of his conference with Getch which he specifically recalled was Getch's concern for protection for himself and his family and, far from any unequivocal statement as to a promise to Getch for his testimony, Bendersky's recollection of his meeting with Getch was clearly hazy, he had only an impression that Getch was a parole violator and contemporaneous question and answer statement of his interview with Getch specifically recited that no promises were made. Such facts fall far short of the pattern in *Giglio*.

Moreover, *Giglio* is no bar to a factual determination on a state post conviction application of whether a promise was made. In *Giglio*, petitioner, a federal prisoner, sought a new trial on the basis of newly discovered evidence, alleging that the Government had failed to disclose a promise of immunity to a key witness, Robert Taliento. In support of his application, the petitioner submitted an affidavit by an Assistant United States Attorney, DiPaola, in which he stated that he informed Taliento that he would not be prosecuted if he testified before the Grand Jury and at trial. In opposition, the Government submitted an affidavit of Golden, the Assistant who took over the case for trial. He stated that DiPaola had told him that no promise of im-

munity had been made to Taliento. Additionally, the United States Attorney Hoey, had filed an affidavit stating that he had personally consulted with Taliento before trial to emphasize that Taliento would be prosecuted if he did not testify and that if he did testify, he would have to rely on the good judgment and conscience of the Government as to whether he would be prosecuted.

This Court observed that the District Court held no hearing and made no factual finding as to whether Taliento had been made any promise but in an obvious exercise of this Court's supervisory power over the federal courts determined that no hearing was necessary since the affidavit of DiPaola unequivocally stated that he had promised a key government witness immunity. The Court also observed that the Hoey affidavit (which stated that the witness was told that he would be prosecuted if he did not testify and that if he did testify he would have to rely on the good judgment of the prosecutor) contained an implication that the Government would reward the cooperation of the witness, confirming the existence of some understanding for leniency. In view of these facts, this Court held that a promise had been made, concluding that it need not concern itself with the differing versions of the events as described by the two assistants.

Contrary to the facts in *Giglio*, the petitioners at bar are state prisoners seeking collateral relief by means of a habeas corpus application. In this posture, this Court unlike the Supreme Court in *Giglio*, is not called upon to exercise any supervisory power over the District Court but instead is presented with a state court factual finding entitled to a presumption of correctness in accordance with 28 U.S.C. § 2254(d). *La Vallee* v. *Delle Rose*, *supra*.

In sum, insofar as petitioners now allege that an undisclosed promise of a reduction in sentence was made to Getch by Bendersky, petitioners were free to explore such

a possibility at trial. Moreover, as subsequently confirmed, no promise was made to Getch and petitioners' belatedly urged claim is without merit.

B. The allegedly undisclosed promise would in no reasonable likelihood have affected the judgment of the jury.

In order to state a claim for relief within *Giglio,* petitioners must prove not only that an undisclosed promise was made by the prosecution, but that the promise, if disclosed, would have in any reasonable likelihood affected the judgment of the jury. This they have failed to do.

Petitioners were convicted of a murder which arose out of a gangland dispute (see Judge Keating's opinion, 19 N Y 2d 65, Petitioners' Appendix A 4). Getch, on September 18, 1963, had only three and one-half *months* to serve on his prison term. If Getch were required to serve a couple of months of this time before being released, he was, in effect, being promised only six weeks off his remaining jail time. Given an individual like Getch, who had served several jail terms and who knew that his testimony would subject both him and his family to reprisal, it strains credulity to accept an argument that for a month or two off his parole time, he would turn state's evidence.

Moreover, and very significantly, Getch had served his sentence in full and was not even on parole at the time he testified at trial, rendering any promise of leniency meaningless.

The immateriality of a promise of 6 weeks off Getch's jail time was well appreciated by petitioner's trial attorneys who during trial repeatedly attempted to make it appear that Getch could be held for two and one-half years for his parole violation, trying to establish that this was the motivation for his testimony implicating the petitioners. However, there was certainly no proof at the *coram nobis* hearing that anyone had threatened Getch with having to

serve two and one-half years if he did not cooperate, neither Mr. Bendersky nor anyone else making any mention of it.

Finally, as the Circuit Court observed, the People had overwhelming evidence to present to the jury that no promise was made to Getch for his testimony and Bendersky's testimony, far from helping petitioners, would have resulted in the disclosure of the promise to protect Getch's family which would have had an adverse affect on their case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York, January 31, 1975.

Respectfully submitted,

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